JUDGE FRANKLIN D. BURGESS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>GARY EVANS JACKSON,<br><br>Defendant. | NO. CR03-0498 FDB<br><br>REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT |

## I. INTRODUCTION.

Important Constitutional issues are before the Court. The Government has emphasized the "heinous" nature of illicit sexual acts committed in Cambodia to justify this prosecution. While dismissal of this action might be an unpopular act, it is necessary in order to uphold the United States Constitution and the Supreme Court's opinions detailing the important limitations on Federal Congressional power. The Government presents numerous confusing and at times conflicting arguments. However, at bottom, to uphold 18 U.S.C. § 2423(c) based on the Government's Response to Defendant's Motion to Dismiss Indictment ("Government's Response") this Court would have to: Disregard the plain language of the statute; Find that Congress has limitless



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power to regulate the acts of American citizen in foreign countries; Find that the Foreign Commerce Clause grants Congress plenary police powers regardless of whether a foreign commerce nexus exists; Find that Congress has the power to criminalize acts in foreign countries of American citizens who last traveled in foreign commerce at a remote time notwithstanding violations of the Due Process Clause and the Ex Post Facto Clause; And find that Congress has the power to criminalize acts in foreign countries of American citizens regardless of whether that may be in conflict with the law of other countries or international law.

The fundamental question before the Court is whether there is a constitutional basis to deem Mr. Jackson's acts a *federal* crime. Mr. Jackson's conduct in Cambodia in and of itself is not a *federal* crime. He last traveled in foreign commerce in 2001 when he left the United States for good. His travel in 2001 was lawful and had nothing to do with the instrumentalities, channels or goods involved in interstate or foreign commerce. He has been charged with a statute that regulates his conduct in Cambodia, not travel in foreign commerce. It is the Court's duty "to say what the law is," Marbury v. Madison, 1 Cranch 137, 177 (1803) and to uphold the rule that Congress does not possess unlimited power to enact whatever legislation it desires. This Court must dismiss this prosecution.

## II. UNDER CONTROLLING SUPREME COURT PRECEDENT, CONGRESS'S REGULATORY AUTHORITY UNDER THE COMMERCE CLAUSE IS NOT "WITHOUT EFFECTIVE BOUNDS." WITH § 2423(C), CONGRESS HAS GONE BEYOND ITS AUTHORITY TO *REGULATE* COMMERCE, AND IS INSTEAD ENGAGED IN FIGHTING CRIMES, WHICH HAVE NOTHING TO DO WITH FOREIGN COMMERCE.

### A. Section 2423(c) is Unconstitutional As Applied Because it is Not Directed at Protecting the Channels of Foreign Commerce.

The government acknowledges that § 2423(c) extends the "reach of prior statutes



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to criminalize acts taking place entirely outside of the United States"[1] and that the statute does not seek to punish those "who travel in foreign commerce."[2] But it asserts nonetheless that Congress has authority to federally criminalize such acts under its power to regulate the channels of foreign commerce.

In support, it cites to circuit case law upholding regulations, which unlike here, prohibit conduct directly injuring or obstructing the federal commerce channels or involving the transportation of categories of goods across state or foreign lines through those channels. But it does not address the crucial distinction at the heart of this case. Whether § 2423(c), a regulation, which does not purport to protect the channels of commerce can be constitutionally validated as a permissible "channels" regulation. The case law makes clear that absent such focus, no constitutional basis under the Commerce Clause exists. See Gibbons v. Ogden, 9 Wheat 1, 194 (1824) (The power of Congress over commerce is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed.").

Section 2423(c) contains a jurisdictional element requiring that the government prove a defendant "travels in foreign commerce." Jurisdictional elements are inserted into statutes to ensure that what the defendant did was within the power of Congress to regulate. United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999); see also United States v. McCoy, 323 F.3d 1114, 1126 (9th Cir. 2003) (Court held that the jurisdictional element "provide[d] no support for the government's assertion of federal jurisdiction" recognizing that just because certain elements of an object have traveled interstate at one time or another does not mean Congress can regulate that object under the Commerce Clause). Here, the element "travels in foreign commerce" signals Congress's attempt to

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[1] Government's Response at 1-2.

[2] Government's Response at 17.



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regulate the use of the channels of commerce but it is constitutionally deficient for two reasons.

First the statute does not require the misuse of the channels of commerce. The statute does not require that a defendant travel in foreign commerce with the "purpose" or intent of engaging in a crime. See e.g., 18 U.S.C. 2423 (b) (making it a crime for citizens "who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct."). Rather, the statute regulates lawful travel.

Second, the statute does not ensure that there exist a nexus between the criminal conduct and foreign commerce. In Lopez v. United States, 514 U.S. 549 (1995) the Court explained that there are two kinds of permissible regulation under the "channels" category: (1) "regulation of the use of the channels of interstate commerce;" and (2) "an attempt to prohibit the interstate transportation of a commodity though the channels of commerce." Id. at 559; see also N. Am. Co. v. SEC, 327 U.S. 586 (1946) ("Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature"); United States v. Schaffner, 258 F.3d 675, 680 (7th Cir. 2001) ("Examples of activity falling within [channels] category one include the shipment of stolen goods, kidnaped persons, prostitutes and guns."). Section 2423(c), which the government concedes does not regulate or place any conditions on persons who travel in foreign commerce but rather seeks "to punish illicit sexual conduct in foreign places"[3] addresses neither.

The circuit court "channels" cases all involve statutes which fall within one of the two permissible categories of channel regulation. United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003), reh'g & reh'g en banc denied by __ F.3d __ (5th Cir. Jan. 7, 2004)

[3] Government's Response at 17.



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(addressing 18 U.S.C. § 2423(b)), United States v. Han, 230 F.3d 560 (2d Cir. 2000) (addressing 18 U.S.C.§ 2423(b)), United States v. Cummings, 281 F.3d 1046 (9th Cir. 2002) (addressing the International Kidnaping Act); and United States v. Shahani-Jahromi, 286 F. Supp. 2d 723 (E.D. Va. 2003) (same) addressed the first kind of channels regulation – the active misuse or impediment to the use of the channels of commerce.[4]

United States v. Rambo, 74 F.3d 948 (9th Cir. 1995), which the government cites at page 9 of its Response, involved the second kind of permissible channels regulation. The Ninth Circuit found that 18 U.S.C. § 922(o), a regulation prohibiting the possession or transfer of machine guns, was constitutionally valid as a channels category of regulation because it is an "'attempt to prohibit the interstate transportation of a commodity [machine guns] through the channels of commerce.'" Id. at 952 (quoting Lopez, 514 U.S. at 559).

Finally, the government cites to United States v. Thomas, 893 F.2d 1066 (9th Cir.), cert. denied, 498 U.S. 826 (1990), stating that "the appellate court held that the extraterritorial application of the child pornography production statute . . . was within Congress' power under the commerce clause." Government's Response at 11. Thomas is not on point. The government has confused the separate concepts of extraterritorial jurisdiction, whether a statute may lawfully be *applied* extraterritorially, and the constitutionality of the statute, whether Congress had commerce clause authority to enact the statute in the first instance. Thomas did not challenge the constitutionality of the child pornography statute, which proscribes the transportation, mailing, and receipt of child pornography in the United States, arguing instead that the statute could not be applied extraterritoriality because he took the photos in Mexico. Id. at 1068-69. The

[4] See Jackson's Motion to Dismiss at 10-13 for discussion of these cases.



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Court upheld the extraterritorial application of 18 U.S.C. § 2251(a) to Thomas noting he brought the photos into the United States. Id. at 1068. Given the activities targeted by this statute–mailing and transportation of child pornography through the channels of foreign commerce–the statute was not vulnerable to a channels of commerce constitutional challenge.

No Court has upheld a federal statute, promulgated under the Commerce Clause, which, as here, is not directed at proscribing the misuse or obstruction to the use the channels of commerce. See e.g., United States v. Schaffner, 258 F.3d 675, 680 (7th Cir. 2001) (Congress may prohibit the movement of child porn in interstate commerce to prevent the spread of injurious or immoral uses). As Lopez reminded the Courts, Congress's Commerce power is not limitless. If § 2423(c) were allowed to stand, **all** criminal conduct outside United States territory committed by a citizen or permanent resident would be subject to federal jurisdiction because those individuals must necessarily have once traveled. Cf., United States v. Stewart, 348 F.3d 1132,1135 (9th Cir. 2003) (rejected argument that because machinegun parts moved in interstate commerce, jurisdictional element met, stating that "[a]t some level, of course, everything we own is composed of something that once traveled in commerce. This cannot mean that everything is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless."). All criminal conduct outside the United States would be subject to federal jurisdiction regardless of whether the channels of commerce had been misused or obstructed. The limits placed on Congress by the Constitution would evaporate. Rather than having a federal government based on powers enumerated and limited by the Constitution, this country would have a federal government with the power to enact whatever laws it so desires. This Court must dismiss this prosecution.



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**B. Section 2423(c) Also Cannot Be Upheld Under the Substantial Affects Prong.**

Section 2423(c) provides for travel in foreign commerce as the only basis for federal jurisdiction. Thus, the statute is not properly considered under the substantial affects prong. See Jones v. United States, 529 U.S. 848 (2000) (there is a "recognized distinction between legislation limited to activities 'in commerce' and legislation invoking Congress' full power over activity substantially 'affecting commerce.'"); Russell v. United States, 471 U.S. 858, 859 (1985) (locution "affecting interstate or foreign commerce" in 18 U.S.C. § 844(I) "expresses an intent by Congress to exercise it full power under the Commerce Clause."); see also United States v. Robertson, 514 U.S. 669, 671 (1995) (per curiam) (emphasis added) (the Supreme Court made clear that the "'affecting commerce' test was developed . . . to define the extent of Congress' power over purely *intrastate* commercial activities that nonetheless have substantial interstate effects); Schaffner, 258 F.3d at 682 (declined to analyze statute prohibiting transporting child porn under "substantial affects" category because the criminal activity necessarily involves the interstate movement of the pornographic material and therefore is properly analyzed under the channels and "things" in commerce categories).

Had Congress intended the statute to be promulgated under the substantial affects prong of the Commerce Clause, it would have so stated by inserting language evidencing that intent. See e.g., § 922(g) ("it shall be unlawful for any person . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce.") (emphasis added). The Government's arguments that this Court may rely on the "substantially affects" prong of the Commerce Clause is thus misguided. That prong cannot be considered to uphold the statute.

Moreover, the gun cases cited to by the government, which have been upheld under the "substantial affects" prong do not support application of this prong here.



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These statutes specifically contain the element of "in commerce or affecting commerce." In other words, the statutes contain a jurisdictional element that ensures a sufficient interstate nexus to justify federal proscription. See e.g., United States v. Bass, 404 U.S. 336 (1971) (upholding statute which proscribes receipt by, among others, a felon of any firearm "in commerce or affecting commerce after concluding necessary interstate nexus existed). The Government's claim that there is a "substantial link" between Mr. Jackson's travel and activity in Cambodia is unsupported and misleading. Mr. Jackson last traveled in foreign commerce in 2001. There is no link between his travel in foreign commerce and his conduct in 2003. The Government's claim that he abused children on June 27, 2003. after arriving back in Phnom Penh misleadingly implies that he had just traveled in foreign commerce. The Government's implication is incorrect and should be disregarded. Mr. Jackson did not just travel in foreign commerce. It is indisputable that his last travel in foreign commerce last occurred in 2001 when he left the United States. The Government also claims that the fact Mr. Jackson received a small pension is a "substantial link." This is nonsense. There is no link between this small pension and Mr. Jackson's travel in foreign commerce in 2001. There is no link between his small pension and any foreign commerce. Acceptance of the Government's argument that this constitutes a "substantial link" would lead to an absurd result. Under the Government's theory, if receiving U.S. funds is a "substantial link," the foreign commerce would be substantially affected regardless of whether a citizen had traveled in foreign commerce.

Further, unlike § 2423(c), gun regulations regulate a commercial commodity, guns, that are manufactured in and travel through interstate and foreign commerce. See Stewart, 348 F.3d at 1139-40; see also United States v. Franklyn, 157 F.3d 90, 94 (1998) (Section 922(o) is integral to a larger federal scheme for the regulation of trafficking in firearms–an economic activity with strong interstate effects).



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Moreover, although the government mentions the Supreme Court's four-part test set forth in Morrison, supra, for determining whether a law regulates an activity that has a substantial effect on commerce, it does not analyze the statute under this test. In Morrison, the Supreme Court set out the controlling test for determining whether a regulated activity "substantially affects" commerce: (1) whether the prohibited activity is commercial or economic in nature; (2) whether there is an express jurisdictional element involving interstate activity that might limit the statute's reach; (3) whether Congress has made findings about the effects of the prohibited conduct on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.[5] Id. at 610-12. The Ninth Circuit has instructed that the first (whether the activity is economic) and fourth (whether the effect of the activity is attenuated) prongs are the most important. See McCoy, 323 F.3d at 1119.

Thus, even assuming that § 2423(c) is properly analyzed under this third category, this criminal statute, which has nothing to do with foreign commerce or any kind of economic enterprise, and which criminalizes conduct against foreign minors that has no significant affect on foreign commerce cannot be sustained under this third category. See Lopez, 529 U.S. at 564 (Court rejected argument that violent crime substantially

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[5] Despite the fact that the government also takes the position that there need be no link between the travel and the illicit sex act, it argues that "there is a substantial link in this case between Jackson's travel in foreign commerce and the illicit sexual activity occurring in a foreign country" because within months of arriving back in Phnom Penh he committed the illicit acts. Government's Response at 12. This argument gives a misleading impression that the acts were committed immediately after travel in foreign commerce where in fact that did not occur. Notwithstanding that the relevant question under Morrison is whether the prohibited activity substantially affected interstate or foreign commerce, Mr. Jackson moved from the United States to Southeast Asia in November of 2001 and did not return to the United States until his expulsion. The indictment charges Mr. Jackson with traveling "from in or about January 2002 [the date he went from Thailand to Cambodia]." That he may have traveled within Southeast Asia using foreign airlines after his move to Cambodia is irrelevant to the constitutional analysis.



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affects commerce by reducing people's willingness to travel to unsafe areas of the country).

## III. EX POST FACTO PRINCIPLES ARE VIOLATED UNDER THE GOVERNMENT'S INTERPRETATION OF THE STATUTE.

This Court should reject the Government's arguments that this prosecution does not violate the Ex Post Facto Clause, U.S. Const. Art. I, Sec. 10.

The Government agrees Mr. Jackson last traveled in foreign commerce in 2001, Government's Response at 2, 28-29, but argues the ex post facto clause is not violated because "what matters" is the illicit conduct occurred after April 30, 2003, the effective date of § 2423(c). This argument flies in the face of the plain language of the statute which states that,

> [a]ny United States citizen . . . who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

As the Government acknowledges, "Congress does mean what it says; " the "best evidence" of Congressional intent is the text of the statute itself. See Government's Response at 14. The language of the statute melds "travels and engages in illicit sexual conduct" into a single substantive element. Congress deliberately chose to use the present tense "travels" and "engages" to describe the conduct proscribed by the statute. The plain language of the statute unambiguously describes acts which occur in temporal proximity or which occur at the same time. As neither "travels" nor "engages in illicit conduct" alone, constitute a federal crime, the language of the statute plainly requires that both substantive facts be considered together and that both facts have occurred after April 30, 2003. If Congress had intended the statute to apply to defendants who had "traveled" prior to April 30, 2003, the statute would have so stated. Congress would have worded the statute to state "any United States citizen . . . who travels or has traveled in foreign commerce, and subsequently engages in any illicit sexual conduct . .



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There was little discussion by Congress regarding the amendment of Title 18 to include § 2423(c). However, in discussing previous legislation on which the amendment was based, Congress noted that "[t]his legislation will close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are *currently* using to their advantage in order to avoid prosecution." H.R. Rep. No. 107-525, at 2 (2002) (emphasis added). Prior to April 30, 2003, it was a crime to specifically travel in foreign commerce with the "purpose of engaging in any illicit sexual conduct" under 18 U.S.C. § 2423(b). It is apparent that Congress intended to prospectively close the "loophole" for future travelers rather than punishing those, such as Mr. Jackson, who traveled long before the statute's enactment. To interpret the statute otherwise would not only run afoul of the Constitution but would lead to absurd results dictated by a prosecutor's virtually unlimited discretion. The plain language of the statute leads to the inescapable conclusion that this prosecution violates the Ex Post Facto Clause.

The Government's contention that "travels" is not a substantive element and "merely jurisdictional" is a desperate attempt to support its argument that for Ex Post Facto purposes, "when the travel occurred is irrelevant." Government's Response at 29. The fact that "travels in foreign commerce" provides the federal jurisdictional basis for the statute does not render it a non-substantive element. When a question of Federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue must be determined by the jury at trial. See United States v. Nukida, 8 F.3d 665, 670 (9th Cir. 1993) citing to United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987). Section 2423(c) requires the Government to prove to a jury beyond a reasonable doubt that a defendant "travels and engages in any illicit sexual conduct." Failure to prove that the defendant "travels and engages," results in failure to prove a violation of the statute. A prosecution under § 2423(c) is clearly a case where the jurisdictional



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question is a substantive element of the crime.

The element of "travels in foreign commerce" is not inconsequential and cannot be disregarded as the Government contends. Rather, as discussed above, it is a key element which the Government must prove occurred at the same time as the element of illicit conduct. As such, both the travels and engages in illicit conduct elements must occur after April 30, 2003. The Ex Post Facto Clause is violated in this case.

The Government also erroneously contends that since § 2423(c) is "concerned with a continuing offense" the Ex Post Facto Clause is not violated. This argument hinges on the erroneous view that "travels in foreign commerce " is not a substantive element and thus when a defendant "travels" is irrelevant. Government's Response at 28-29. As discussed above, the plain language of the statute requires that the unified elements of travel and illicit conduct both have occurred after April 30, 2003. "Travels" is a substantive element and cannot be disregarded as argued by the Government.

Additionally, there is nothing in the plain language of § 2423(c) that supports the notion that the statute concerns continuing offenses. The statute contains no language concerning schemes, continuing plans, conspiracies or engaging in any criminal enterprise. The "travels" element does not involve or require any planning, criminal intent, or scheme to commit illicit acts, and stands in sharp contrast to 18 U.S.C. § 2423(b) which criminalizes "travel for the purpose of engaging in any illicit sexual conduct." Rather the statute criminalizes an individual's conduct in a foreign country regardless of the plan or intent the individual had formed prior to or during travel in foreign commerce. Thus the language of § 2423(b) clearly establishes that the statute does not concern a continuing offense.

Further, the indictment in this case alleges no scheme, plan, enterprise or conspiracy to travel in foreign commerce with criminal intent, or that Mr. Jackson traveled in foreign commerce with the intent to engage in illicit sexual conduct.



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Ultimately, in order to avoid an Ex Post Facto violation, the Government's argument is to delete the "travels" element and to rewrite § 2423(c) to read that it is a federal offense for a United States citizen to engage in any illicit sexual conduct in a foreign country.

Finally, the Government argues § 2423(c) does not violate the Ex Post Facto Clause because its "regulatory scheme" is like the scheme in 18 U.S.C. § 922(g). Government's Response at 29. However, § 922(g) and the cases addressing it, support Mr. Jackson's position, not the Government's.

First, the language used in § 922(g) clearly establishes that the statute applies to guns which have traveled in interstate commerce prior to the enactment of the statute. Unlike the present tense language used in § 2423(c), Congress in drafting § 922(g) addressed travel in interstate or foreign commerce in both the present and the past tenses. Section 922(g) states in pertinent part

> It shall be unlawful for any person . . . to ship or transport in interstate or or foreign commerce, or possess in or affecting commerce, any firearms or ammunition; to receive any firearm or ammunition which has been shipped or transported in interstate commerce or foreign commerce.

The plain language of § 922(g) makes clear that Congress intended it to apply to firearms which had been shipped or transported prior to the statute's effective date.

Second, the Government's contention that § 922 was intended to regulate possession by prohibited persons not when firearms traveled in interstate commerce is contrary to powers delegated to Congress under the Constitution and Supreme Court cases construing Congress' authority to regulate firearms under the Commerce Clause. See Government's Response at 29. The Supreme Court has made it clear that the Commerce Clause allows Congress, under statutes such as § 922, to regulate firearms that have an impact on interstate commerce, not merely the person who possesses the firearm. A person who possesses a firearm does not commit a federal offense unless the firearm has an explicit connection with or effect on interstate commerce.



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In United States v. Lopez, supra the Supreme Court discussed how a Federal statute which does not contain a requirement that possession of a firearm be connected to interstate commerce would exceed Congress' authority under the Commerce Clause, Art. I § 8, cl. 3. That case addressed 18 U.S.C. § 922(q) which made it a crime "for any individual to possess a firearm at a place that the individual knows, or has reason to believe is a school zone." Id. 514 at 551. The Supreme Court stated that "§ 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 561. The Supreme Court found § 922(q) unconstitutional because "possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce." Id. at 567. The Lopez decision clearly shows that § 922 intended to regulate firearms which traveled or affected interstate commerce, not possession by prohibited persons. See United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003) (Conviction of defendant for possession of machine gun he made himself was an unlawful extension of Congress' commerce powers since he did not obtain the gun by using the channels of commerce, and the possession did not have a substantial affect on interstate commerce).

The Government's contention that "regulatory scheme" contained in § 922 supports the conclusion that Congress may, under the Commerce Clause, focus solely on the acts of an individual, rather than the travel and "criminalize acts taking place entirely outside of the United States" is meritless and should be rejected by this Court.

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## IV. EVEN ASSUMING THAT THE PROVISION COULD BE DEEMED TO FALL UNDER CONGRESS' AUTHORITY TO REGULATE THE CHANNELS OF FOREIGN COMMERCE, GRAVE CONSTITUTIONAL DOUBT CAN ONLY BE AVOIDED BY CONSTRUING THE TERM "TRAVELS IN FOREIGN COMMERCE" TO MEAN THAT THE SUBSTANTIVE CRIME OF SEX WITH A MINOR OCCURRED DURING THE FOREIGN TRAVEL.

The government asserts at length that Congress intended the statute to be applied extraterritorially and contends that Mr. Jackson "ignores" this intent in arguing that the guiding principles of statutory construction dictate that the statute must be narrowly construed in order to avoid constitutional doubt and to comply with the rule of lenity. See Government's Response at 16 and Motion to Dismiss at 18-19. Again, the government has confused two separate issues: the issue of extraterritorial application of a federal statute and the proper statutory construction of the statute.

With respect to the issue of extraterritorial application, it is Mr. Jackson's position that even assuming that the limit on the extraterritorial application of a federal statute is overcome, the jurisdictional reach of § 2423(c) extraterritorially violates international law principles, would be unreasonable and violates the Fifth Amendment Due Process Clause as well as ex post facto principles. See Motion to Dismiss at 24-29 and below.

On the completely separate issue of statutory construction, because the term "travels in foreign commerce" in relation to the prohibited sex acts is ambiguous, the fundamental principles of statutory construction apply. As made clear by the parties' differing interpretations of the statute, the statute's plain language is ambiguous. Although the statutes specifically uses the term "travels" and "engages," the government states that the elements are that (1) the "defendant traveled in foreign commerce"; (2) the defendant engaged in illicit sexual conduct; and (3) the defendant was a United States citizen or permanent resident. Government's Response at 31. It argues that the statute's plain meaning and the legislative history support the interpretation that it applies to those "who engage in illicit sexual conduct who travel in foreign commerce (innocent or



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otherwise)." Government's Response at 17. Without further illuminating what this means, the government further asserts that the Court in interpreting the statute should disregard the travel "component" of the statute because it is "merely jurisdictional" and focus only on the "act of engaging in illicit sexual conduct that is the crime, not a defendant's travel." Government's Response at 17 n. 16.

But as discussed above, at pages 9-10, the element of "travels in foreign commerce" is not "*merely* jurisdictional" but rather is an element that the government must prove beyond a reasonable doubt to ensure that what the defendant did was within the power of Congress to regulate. United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999); see also Lopez, 514 U.S. at 560 (§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce). Here, the statute is constitutional only if it regulates channels of commerce. See, e.g., Bredimus, 352 F.3d at 207 (§ 2423(b) constitutional as a "channels" regulation because it punishes crossing the state or international line with criminal intent). The government's interpretation of the statute raises grave constitutional doubt because as read by the government, it does not seek to regulate prohibited *movement* or obstruction to movement in foreign commerce. This interpretation is unsupportable under existing Supreme Court precedent. See Hoke v. United States, 227 U.S. 308, 320 (1913) (With respect to travel, Congress has Commerce authority to regulate "transportation obtained or aided, or transportation induced in [foreign] commerce, for . . . immoral purposes[.])" The only constitutional manner in which the Court can interpret the statute is to require that the unlawful acts occur during the transportation or use of a federal channel.

A review of the statutory language also supports a narrow construction. The statutory language is ambiguous when viewed outside the context of the purpose of the statute. It is apparent that the "travels in foreign commerce" element means movement



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by an individual from the United States to a certain country. However, the statutory language does not clarify when the illicit sexual conduct must occur in relation to that travel. Nor does the structure of the statute suggest the correct interpretation. For example, the statute does not employ the word "thereafter" or subsequent to after the phrase "travels in foreign commerce." Rather, a plain reading of the statute suggests that the illicit act and the travel must occur at the same time or in close proximity to one another. Again, that is the only constitutional manner in which the statute can be read. See Perez v. United States, 402 U.S. 146, 150 (1971) (Congress has authority to prevent the misuse of channels of interstate or foreign commerce); Jones, 529 U.S. at 857 ("Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read § 844(I) broadly).

The purpose of the statute also supports a narrow reading of the statute to apply only to those who travel and engage in the illicit sex act during the use of the channels of commerce.

Thus, assuming that this Court were to hold that § 2423(c) is a valid exercise of Congress's commerce power, given the ambiguity of the phrases "travels in foreign commerce, *and* engages in any illicit sexual conduct" which the legislature has chosen not to define, the only manner in which the statute can be interpreted to avoid serious constitutional doubt, is to require, as with similar "channels" statutes, that the illicit sexual conduct occur during the travel from the United States to a foreign country.

Mr. Jackson last traveled in foreign commerce in 2001, nearly two years before the effective date of § 2423(c). His travel in 2001 was lawful. The illicit acts the Government relies on in this case occurred in June 2003. There is no connection between Mr. Jackson's lawful travel in 2001 and the acts in 2003; the statute cannot be constitutionally applied to him and the indictment must be dismissed.



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## V. EVEN ASSUMING CONSTITUTIONALITY OF THE STATUTE, JURISDICTION OVER THIS PROSECUTION VIOLATES INTERNATIONAL LAW AND THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

Whether Congress has exercised its authority to enforce the laws of the United States outside the country's territorial boundaries is a matter of statutory construction. Even assuming however that Congress intended the statute to be applied extraterritorially, as the government acknowledges, that application cannot violate international law or due process. United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994); United States v. Davis, 905 F.2d 245, 249 n. 2 (9th Cir.), cert. denied, 498 U.S. 1047 (1991). If § 2423(c) violates international law, this prosecution must be dismissed.

International law permits the exercise of extraterritorial jurisdiction only in certain circumstances. The government argues that extraterritorial application of § 2423(c) not only is valid under the United States Constitution but also does not violate the nationality principle under international law. But as pointed out by Mr. Jackson at page 21 of his motion, the nationality principle has seldom been relied upon as the sole basis for an exercise of such jurisdiction. Rather, it is invoked primarily in conjunction with the objective territorial or protective jurisdiction principle to assert jurisdiction over American nationals whose acts outside the country produced, or were intended to produce, detrimental effects within this country. For example, the government cites to United States v. Walczak, 783 F.2d 852 (9th Cir. 1986) as a case treating the nationality principle as a sufficient basis for the exercise of jurisdiction. But in Walczak, the Court found three bases for asserting jurisdiction (including the nationality principle) over Walczak, who was charged under 18 U.S.C. § 1001 with making a false statement on a customs form, including the fact that the language of the statute literally applies to false statements made on custom forms, which is in the jurisdiction of the United States,



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without regard to the place where the offense occurred. See also, United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000) (upholding extraterritorial application of 18 U.S.C. § 545, as well as the Trading With the Enemy Act, to boat headed to United States loaded with Cuban cigars); United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002) (cited by government at page 20 of response) (extraterritorial jurisdiction for evasion of child support payments appropriate under territorial, nationality, and passive personality principles); Thomas, 893 F.2d at 1069 (upholding extraterritorial application of 18 U.S.C. § 2251(a) to defendant who took pornographic photos of children in Mexico and brought them to United States).

Further, as the government also acknowledges, even if the nationality principle by itself were somehow regarded as an appropriate basis for the extraterritorial application of § 2423(c), this Court must also find that its application extraterritorially would be reasonable and that it would not violate the Fifth Amendment Due Process Clause, and thus would not be "arbitrary and fundamentally unfair."

The government asserts that even if a sufficient "nexus were not established solely on the basis of Mr. Jackson's citizenship, his ties with the United States would satisfy this requirement. But an examination of the facts in this case demonstrates the unreasonableness and unfairness of applying the statute to Mr. Jackson.

Mr. Jackson lawfully left the United States with his partner in November of 2001, to permanently live in Southeast Asia, some two years before the enactment of the statute. Mr. Jackson left no real or personal property in the United States and purchased a permanent home for himself and his partner and his adopted Cambodian family in Phnom Penh. The only physical link Mr. Jackson maintained in the United States was a joint account with Washington Mutual Bank, which he used as a repository for his



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pension deposits.[6]

Most importantly, at the time of his move, sex with a Cambodian citizen was not a federal crime. Thus, Mr. Jackson had no knowledge that future acts against citizens in his adopted country would subject him to federal jurisdiction (as opposed to punishment in Cambodia). As the government acknowledges, citing to United States v. Vasarajs, 908 F.2d 448, 448 (9th Cir. 1990), "[t]he maxim that ignorance of the law is no excuse for committing a crime . . . *presupposes* a penal statute that adequately puts citizens on notice of what is illegal."[7] In fact, after the enactment of the statute, Congress directed that the President ensure travelers are notified that "sex tourism" is now illegal. 22 U.S.C. § 7104(e)(1) directs that "The President, pursuant to such regulations as may be prescribed, shall ensure that materials are developed and disseminated to alert travelers that sex tourism (as described in subsections (b) through (f) of § 2423 of Title 18) is illegal, will be prosecuted, and presents dangers to those involved. Such materials shall be disseminated to individuals traveling to foreign destinations where the President determines that sex tourism is significant." This statute did not take effect until December 19, 2003, long after Mr. Jackson had moved to Cambodia.

Here, application of the statute extraterritorially to apply to individuals such as Mr. Jackson who permanently moved from the United States years before the statute's enactment is unreasonable and fundamentally unfair.

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[6] The government incorrectly asserts that Mr. Jackson received military benefits suggesting that he was living in Cambodia using federal funds. Mr. Jackson's pension however was not from the military but from his employment as civilian marine carpenter.

[7] The government also cites to United States v. Moncini, 882 F.2d 401 (9th Cir. 1989) for the proposition that Mr. Jackson should have known that he would be subject to prosecution in the United States for his conduct because the acts were "heinous and condemned." The issue however is not whether Mr. Jackson's acts are punishable but whether those acts are *federal* crimes. Moncini is distinguishable because it, unlike here, involved the mailing of child pornography *into* the United States.



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## VI. CONCLUSION.

The Constitution empowers the judiciary to determine the limits of Congress's power. Section 2423(c) goes far beyond Congress's power under the Commerce Clause. Instead of regulating the channels of commerce, it makes acts committed entirely in a foreign country a federal crime regardless of whether the channels of commerce have been misused or whether the act has any connection to travel in foreign commerce. Even if this Court were to uphold the unprecedented expansion of Congress's Commerce Clause power which would follow from sustaining this statute, the Ex Post Facto and Due Process Clauses would be violated. The plain language of the statute makes it crystal clear that this statute applies only to whosoever "travels" and "engages in illicit sexual conduct" after the statute's effective date, April 30, 2003. Mr. Jackson respectfully requests that the Court dismiss the indictment based on the foregoing arguments and those set forth in the original motion to dismiss.

DATED this 1st day of July, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Susan B. Dohrmann, Assistant United States Attorney, 601 Union Street, Suite 5100, Seattle, WA 98101-3903; and John Lulejian, Assistant United States Attorney, 601 Union Street, Suite 5100, Seattle, WA 98101-3903.

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